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JUN 28 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 28, 2001

DAVID A. O'CONNOR
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Internet Address:
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VIA HAND DELIVERY
Magalie Roman Salas, Esq.
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: TDS Metrocom, Inc.
PETITION FOR STAY PENDING RECONSIDERATION
***In re Access Charge Reform*, CC Docket No. 96-262**

Dear Ms. Salas:

Transmitted herewith, on behalf of TDS Metrocom, Inc., are an original and four (4) copies of its Petition for Stay Pending Reconsideration in the above-captioned proceeding.

An extra copy of the filing is enclosed. Please date-stamp the extra copy and return it to the courier for return to me.

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

HOLLAND & KNIGHT LLP

David A. O'Connor

David A. O'Connor
Counsel for TDS Metrocom, Inc.

Enclosure

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JUN 28 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	
	)	CC Docket No. 96-262
Reform of Access Charges Imposed by	)	
Competitive Local Exchange Carriers	)	

PETITION FOR STAY PENDING RECONSIDERATION

Margot Smiley Humphrey
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June 28, 20001

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SUMMARY

By this Petition, TDS Metrocom, Inc. (TDS Metrocom or Metrocom) is requesting that the Commission stay the effectiveness of the Seventh Report and Order (Order) on competitive local exchange carrier (CLEC) access charge benchmarks and mandatory detariffing.[1] TDS Metrocom requests that the stay cover TDS Metrocom and all similarly situated CLECs that serve small and medium-sized markets, as opposed to large urban core markets. TDS Metrocom is requesting that the stay be imposed at least until such time as the Commission has issued a decision on the merits in response to TDS Metrocom's Petition for Reconsideration of the Order, which Petition was filed on June 20, 2001. TDS Metrocom demonstrates in this Petition for Stay that its request for a stay is fully supported both substantively and procedurally.

Procedurally, TDS Metrocom shows that the Commission erred in failing to review, let alone discuss, Metrocom's proposed alternative plan to the plan ultimately adopted by the Commission. Computer errors at the Commission should not prevent TDS Metrocom from its right to be heard by the Commission. Nor do computer errors remove the Commission's obligation to consider and discuss the viewpoints of all interested parties. Thus on procedural grounds alone, TDS Metrocom is entitled to a stay pending Commission review, for the first time, of Metrocom's proposals.

Substantively, TDS Metrocom is also likely to prevail on the merits. TDS Metrocom has raised serious questions on the merits that warrant grant of a stay. The Order prescribes below-cost rates for Metrocom and other CLECs that target small and medium-sized markets and residential customers. Like the rural carriers, which the Order exempts because they lack low-

cost urban markets, TDS Metrocom lacks the competing ILEC's largest, lowest-cost markets in each state. Although the benchmark prevents tariffing over ILEC average charges, both the ILEC and TDS Metrocom incur higher costs in the smaller, higher-cost markets where Metrocom provides service. Thus, the Order effectively prescribes unlawful below-cost rates for CLECs, in contravention of Sections 201 and 205 of the Communications Act of 1934, as amended. The Commission's denial of even the benchmark "safe harbor" to new markets, without prior notice and opportunity to comment, also unlawfully impedes competition and requires below-cost rates.

In addition, TDS Metrocom set forth in its unread reply comments (and reiterated in its Petition for Reconsideration) its more sensible, and less harmful, alternative proposal to the one-size-fits-all access charge regime adopted by the Commission in the Order. Given due consideration by the Commission, TDS Metrocom submits that its more sensible alternative will likely be adopted by the Commission in lieu of the unlawful and unfair regime established in the Order.

TDS Metrocom also satisfies the other parts of the standard for granting a stay. For many reasons, Metrocom demonstrates in the Petition for Stay that it will suffer significant and irreparable harm if the benchmarks and mandatory detariffing rules are not stayed. These reasons include a drastic reduction in revenue streams, palpable investment uncertainty, a likely loss of skilled employees and an inability to attract competent replacements, and loss of market share and customers. In addition, irreparable harm to TDS Metrocom cannot be avoided either

[1] *In the Matter of Access Charge Reform and Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 01-146 (rel. April 27, 2001) (Order).

(1) by negotiating with interexchange carriers (IXCs), since they will have little, if any, reason to negotiate with TDS Metrocom, or (2) by raising its end user rates to non-competitive levels.

Third, no other interested parties, including IXCs, will be substantially harmed if a stay is issued in this proceeding. This is because Metrocom's portion of annual access revenue is minuscule to the point of being insignificant (approximately 0.00032% of the total access revenue market reported in 1999). Other carriers serving small and medium-sized markets likely represent a similarly insignificant percentage of annual access revenue.

TDS Metrocom also demonstrates that the public interest will be served by the issuance of a stay. Commission precedent indicates that a stay is warranted where a CLEC would be hindered from developing and offering its competitive local exchange services. Moreover, the Commission's Order rests on the expectation that TDS Metrocom and other similarly-situated CLECs will pass any costs resulting from the Order along to its customers. It would disserve the public interest to relegate TDS Metrocom to further raising end user rates, because its customer base is comprised of largely residential and small business customers, all of whom reside in small and medium-sized markets. Discouraging the offering of competitive choices for these customers would run counter to the public interest.

Finally, TDS Metrocom fully supports the Emergency Petition for Stay of Order filed by Mpower Communications Corp. and North County Communications, Inc. on June 18, 2001, and urges the Commission to issue a stay for the reasons stated therein. Notwithstanding its support of the Mpower Petition, TDS Metrocom submits that the grounds for TDS Metrocom's Petition for Stay represent an independent justification for issuing a stay, and therefore Metrocom urges the Commission to issue a stay immediately.

WAS1 #988769 v1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	
	)	CC Docket No. 96-262
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	
	)	

PETITION FOR STAY PENDING RECONSIDERATION

TDS Metrocom, Inc. (TDS Metrocom or Metrocom), by its attorneys and pursuant to Sections 1.41, 1.43, and 1.44(e) of the Commission's rules, 47 C.F.R. §§ 1.41, 1.43, 1.44(e), hereby requests that the Commission stay the implementation of the Commission's decision[1] on CLEC access charge benchmarks and mandatory detariffing in the above-captioned proceeding, pending the Commission's consideration of TDS Metrocom's Petition for Reconsideration of that decision, which Petition was filed on June 20, 2001. The Order became effective June 20, 2001, and TDS Metrocom is in the process of filing a tariff reducing its access charges to 2.5 cents per minute, pursuant to the Commission's prescribed transitional benchmark.[2]

In order to prevent significant and irreparable harm to TDS Metrocom, and because of the likelihood of Metrocom's success on the merits of its Petition for Reconsideration, TDS Metrocom submits that these and other criteria for justifying a stay are fully satisfied in this instance.

TDS Metrocom also supports the Emergency Petition for Stay of Order filed June 18, 2001 by Mpower Communications Corp. and North County Communications, Inc. (Mpower

[1] *In the Matter of Access Charge Reform and Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 01-146 (rel. April 27, 2001) (Order).
[2] 66 Fed. Reg. 27,892 (2001).

Petition).[3] In tandem with TDS Metrocom's Petition for Stay, Metrocom urges the Commission to grant the relief requested in the Mpower Petition.

I. Background

A. The TDS Metrocom Difference

TDS Metrocom is a facilities-based Competitive Local Exchange Carrier (CLEC) providing voice and data services to residential and business customers in small and medium-sized markets in Illinois, Michigan and Wisconsin, markets that have been overlooked by other CLECs. TDS Metrocom is quite unusual among CLECs in that it is providing services to both business and residential customers. Of TDS Metrocom's 90,000 lines, over 35,000 (nearly 40%) are residential lines serving customers in these small and medium-sized markets.[4] Indeed, of the approximately 7,000 loops added monthly, about 4,000 of them are residential loops on unbundled loops, not using either resale or UNE-P. Because Metrocom selects smaller markets for its CLEC operations, it is essential to serve both business and residential customers to meet Metrocom's financial model requirements. TDS Metrocom firmly believes that the only way to obtain enough access line market share is to serve both segments.

A number of the communities served by Metrocom have populations of 10,000 or less. Because of the low density of customers being served by Metrocom in its market areas, Metrocom is more similarly situated to an independent ILEC than an incumbent RBOC. Before the cut required by the Order, Metrocom's rates, based on its costs and the rates of ILECs with comparable characteristics (a methodology that the Commission itself justified in its recent Order resolving complaints against BTI Telecom),[5] were slightly under 4 cents per minute. This rate

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[3] A copy of the Mpower Petition is available on the Internet at http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512660652.

[4] For example, the Wisconsin communities of Appleton, Beloit, Depere, Fond Du Lac, Green Bay, Janesville, Middleton, Neenah, Oshkosh, Pewaukee and Stoughton.

[5] *AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, FCC 01-185, paras.

was well below the highest rate identified in this proceeding (9.5 cents per minute) and in line with weighted averages of CLEC rates that were submitted by the major IXCs (AT&T – 4.3 cents, Sprint – 3.48 cents, and WorldCom – 4.16 cents (para. 48 and Table 1)).

B. TDS Metrocom's Proposal

TDS Metrocom participated in the proceedings leading to the Order to support benchmarks that recognize that CLECs, with small and medium market and heavily residential customer bases, confront significantly different costs, a greater lack of scale and the absence of truly low-cost markets for cost averaging. Because of an apparent computer glitch in the Commission's Electronic Comment Filing System, the Commission did not read, and the Order does not evaluate or discuss, Metrocom's reply comments. Those lost reply comments explained why a proposed alternative plan to the one set forth in the Order, and the CLEC association plan proposed in the opening round of comments on safe harbor benchmarks, is necessary for small and medium-sized market competitors with significant residential service. Consequently, TDS Metrocom has been forced to cut its rates almost by one half without being heard by the Commission on why that should not be ordered. The Order has already forced Metrocom and its investors to reassess its basic business plan and put all expansion plans on hold. For these reasons, TDS Metrocom has filed the instant Petition for Stay pending Commission consideration, for the first time, of the Order in light of the proposed alternative plan.

C. The Order.

Without considering the merits of TDS Metrocom's proposals, the Commission released its Order prescribing benchmark caps which would be presumed "reasonable" for tariffed CLEC access charges. The substance of the Order was supported by primarily large, urban-centered CLECs that typically focus on the densest urban markets, and did not reflect the views, or even

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56-57 (rel. May 30, 2001).

discuss, the effects of the Order on smaller market CLECs. Yet the Order (para. 50) gave weight to the seeming consensus of those parties whose proposals it actually considered in adopting its single benchmark for all but the most rural CLECs.

Although the Commission twice rejected the notion that CLEC rates above ILEC levels can be assumed unreasonable, and has never found that cost-based rates in medium-sized markets are unreasonable, the Commission's Order has set ILEC access charge levels as the transition goal and ultimate requirement for CLECs in higher cost medium-sized markets. Since TDS Metrocom does not serve the densest urban markets in its states, and the competing ILEC averages its lower costs for those markets into the average rate used for the benchmark, the benchmark is below the cost for the small and medium-sized and residential markets Metrocom serves. Any rates above a "safe harbor" based on incumbents' averaged charges are mandatorily detariffed and left to intercarrier negotiations. The Order also contemplates (para. 54) increased charges for end users to make up for lost revenues. While the Order exempts CLECs serving the most rural portions of RBOC service areas where CLECs compete, it does not in any way accommodate the needs of the atypical carriers like Metrocom that target service outside the most profitable Tier 1 markets.

II. Standard of Review for Implementing a Stay

The Commission uses a four-pronged test to determine whether to stay the effectiveness of a Commission rule. A stay will be granted where: 1) the petitioner is likely to succeed on the merits of its petition; 2) the petitioner will suffer irreparable harm absent a stay; 3) a stay would not substantially harm other interested parties; and 4) the public interest would be served by granting the stay. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 423 (8th Cir. 1996) (citing *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 673-74 (D.C. Cir. 1985)). The Commission will grant a stay to preserve the status quo "when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious legal harm." *Florida Public Service Commission Request for Interpretation of the Applicability of the Limit on Change in Interstate Allocation, Section 36.154(f) of the Commission's Rules*, Order Granting Motion for Partial Stay, 11 FCC Rcd 14,324, para. 3 (1996) (citing *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977)).

In this case, TDS Metrocom satisfies all four prongs of the test, as demonstrated below. Moreover, there are serious legal and due process issues involved concerning the Commission's administrative failure to consider the views contained in TDS Metrocom's reply comments and its prescription of the ILEC's averaged charges as a ceiling for TDS Metrocom's charges based on less-dense, higher cost markets, without the lowest cost urban markets to offset higher costs. In light of this failure, and because little harm would occur to interexchange carriers if the status quo were preserved, and substantial harm will occur to TDS Metrocom if the Commission denies the stay, the Commission should use the standard set forth in Washington Metropolitan as a justification for issuing the requested stay.

A. Likelihood of Success on the Merits

The first prong examines whether a petitioner has demonstrated that it is likely to succeed on the merits. In this case, TDS Metrocom satisfies this requirement on both a procedural and a substantive basis.

i. Procedural Errors

It is beyond question that because of an error in the ECFS system, the Commission failed to consider the views of TDS Metrocom in this proceeding. Because of this failure, the Commission has failed to comply with federal administrative procedures and due process, since Metrocom was not "heard" on the ALTS proposal or its own counterproposal. Therefore, implementing the rules against TDS Metrocom before the Commission considers the viewpoints of TDS Metrocom is fundamentally unfair.

As a matter of procedural due process, the Commission is charged with considering all significant comments and alternatives filed in response to proposed new rules. Section 1.425 of the Commission's rules, 47 C.F.R. § 1.425, requires the Commission to "consider all relevant comments and material of record before taking final action in a rulemaking proceeding and [to] issue a decision incorporating its finding and a brief statement of the reasons therefor." Section 553 of the Administrative Procedure Act, which governs FCC proceedings, provides that an agency must "give interested persons an opportunity to participate in [a] rule making through submission of written data, views, or arguments . . . ." 5 U.S.C. § 553(c).

In addition, a federal agency is required to consider the relevant alternatives and identify the reasons for its preference. *Motor Vehicle Mfrs. Assoc. v. State Farm*, 463 U.S. 29, 42-43, (1983). The agency is further required to give reasoned responses to all significant comments in a rulemaking proceeding, *PPG Indus., Inc. v. Costle*, 630 F.2d 462, 466 (6th Cir. 1980), and must "respond to specific challenges that are sufficiently central to its decision." *International Fabricare Institute v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992).

In this case, through no fault of Metrocom's, the Commission failed to consider the alternative plan presented by TDS Metrocom. The alternative proposal to the one-size-fits-all benchmarks was properly and timely filed in reply comments submitted via the ECFS system on January 28, 2001. Responding to the ALTS GREAT plan, these reply comments were electronically filed in both of the two proceedings captioned on the ALTS filing and involved in the Commission's access reform benchmarking and detariffing decision (CC Docket Numbers 96-262 and 97-146), as the attached electronic receipts demonstrate. The ECFS system, however, showed the filing only in the mandatory detariffing proceeding, whereas the Commission apparently drew the electronic record that received consideration from the portion of the ECFS database for Docket 96-262, the docket from which TDS Metrocom's electronically filed document was somehow omitted. Metrocom's comments were clearly a significant part of this proceeding, because they proposed a necessary, workable, alternative plan to the one ultimately adopted by the Commission. TDS Metrocom's plan is significant in that it would, if adopted, lead to greater competition in small and medium-sized markets.

Thus, the Commission's failure to consider Metrocom's reply comments and proposal plainly denied it the right to be heard under the Administrative Procedure Act, and runs afoul of consistent case law mandating agency consideration of all significant comments. Moreover, as the Mpower Petition cogently explains (pp. 9-14), the Order also violates the duty to provide notice and an opportunity for comment because the denial of even the benchmark "safe harbor" for "new" markets was never proposed or presented in the record at all.

Finally, it is well settled that an agency cannot depart from established precedent without a full explanation of the reasons for the departure. *See Graphic Communications Int'l Union v. Salem-Gravure Div. of World Color Press, Inc.*, 843 F.2d 1490, 1493 (D.C. Cir. 1988) ("Agency decisions that depart from established precedent without a reasoned explanation will be vacated as arbitrary and capricious"). Prior to the issuance of the Order, the Commission has twice held, correctly, that a CLEC's rates above the ILEC's charges cannot be presumed excessive, merely because they exceed the competing ILEC's level. *See Sprint Communications Co. v. MCG Communications, Inc.*, 15 FCC Rcd 14,027 (2000); *MCG Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11,647 (1999). The Commission's sudden abandonment in the Order of this twice-held conclusion, without a reasoned explanation, represents the kind of change from precedent that is at odds with reasoned decisionmaking. There is no basis in the record that the ILEC rate levels to which the Order effectively limits CLECs is "just and reasonable," as required by a prescription under Section 205 that replaces tariffed rates that are already in effect. For this reason, and the other reasons discussed above, TDS Metrocom has demonstrated the likelihood of the success of its Petition for Reconsideration on procedural grounds.

ii. Substantive Errors

Although TDS Metrocom has demonstrated that the Commission should issue a stay based on faulty procedure alone, Metrocom nonetheless submits that the substantive arguments contained in its Petition for Reconsideration constitute independent grounds for determining that TDS Metrocom is likely to succeed on the merits. Those arguments are briefly set forth here.

As TDS Metrocom has demonstrated in its Petition for Reconsideration (pp. 11-17), the Order's one-size-fits-all non-rural benchmark and mandatory detariffing amount to an unlawful rate prescription of below-cost rates for CLECs, which are plainly not "just and reasonable," as required by Sections 201 and 205 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 201, 205.

The Order requires CLECs that serve higher cost portions of BOC service areas, where ILEC access charges are averaged with the lowest-cost urban centers served by the ILEC, to detariff any charges that are above the competing ILEC's charges. The Order establishes this requirement even though an ILEC's costs for serving the market segments TDS Metrocom serves, determined on a disaggregated basis which reflects how costs are actually incurred, are also higher than the ILEC's averaged rates, but are subsidized by its low cost service in urban areas. It is a well-established principle that "[It] is the actual impact of the FCC's actions, rather than the language it uses, which determines whether or not the FCC has 'prescribed' tariffs or other conditions under the statute."[6] In adopting rules about when CLECs may file tariffs and

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[6] *Southwestern Bell Telephone. v. FCC*, 168 F.3d 1344 (D.C. Cir. 1999) (quoting *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 337 (D.C. Cir. 1980) and citing *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 874 (2d Cir. 1973) (concluding that the FCC's denial of

what rates will be deemed reasonable, the Commission here has effectively prevented CLECs in higher cost non-rural areas from charging cost-based rates.

Plainly, the impact of the decision is to prescribe below-cost rates for any CLEC with access rates above the transitional or post-transition rate ceilings. A CLEC that serves small and medium-sized markets, and not the lowest-cost urban areas, has no way to average its costs and match the ILEC's averaged charges. The Commission did not even provide a backstop for a CLEC in a higher cost market to show regulators that its costs exceed the BOC average charges for the CLEC's portion of the ILEC service area or obtain arbitration. The Commission relied on CLEC negotiations or end user rate hikes by CLECs to recover the costs that the benchmark revenues leave uncompensated. However, as explained below in Section II.B.iii, neither higher end user rates nor IXC consent to rate increases provides a realistic prospect for recovering the lost revenues.

A rate prescription cannot be lawful under section 201 or 205 of the Act with neither a fact-based finding that rates set by CLECs' serving lower tier markets and residential customers are unjust and unreasonable nor a justification for prescribing the same nationwide CLEC rate ceilings (except in the most rural areas), particularly in the absence of an adequate explanation for abandoning the Commission's own precedents rejecting a presumption that above-ILEC CLEC charges are unreasonable. The Order properly recognized (para. 64) that very rural carriers cannot average costs like the huge price cap ILECs. It discriminates against small and medium-sized market CLECs to deprive them of any meaningful relief for the *same* problem.

Consequently, TDS Metrocom urged the Commission to modify its order to require IXCs to negotiate or submit to arbitration to set cost-based rates in density zones where BOC UNE and transport charges are already deaveraged because of density-based cost differentials. TDS

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permission to file a tariff revising charges for an interstate service had the same effect as a

Metrocom's Petition for Reconsideration also urged the Commission to permit CLECs with above-ILEC cost-based access charges to cost-justify and charge higher rates in state commission filings and defer to the cost differentials established by the state proceedings for interstate access charges, as well. TDS Metrocom urgently requested prompt action to make negotiations and cost-based rates a real option for CLECs that target higher cost portions of BOC markets where averaged rates do not accurately reflect either the CLEC's or the BOC's access costs. Until the errors in the Order are corrected, Metrocom and similarly-situated CLECs in small and medium-sized markets (but not the largest markets) are barred from tariffing and charging cost-based, non-confiscatory rates.

B. Irreparable Harm

TDS Metrocom will undeniably suffer significant and irreparable harm if the benchmarks and mandatory detariffing rules are not stayed, for four reasons.

i. Drastic Reduction in Revenue Streams

First, TDS Metrocom's revenue streams and operating margins will be immediately and drastically reduced. Its access revenues have been reduced by approximately 22.5% since the effective date of the order.[7] However, it would be naïve for TDS Metrocom's management and investors to assume that the Commission's order will only affect interstate rates and revenues.

Furthermore, IXCs have consistently withheld payments to CLECs wherever CLEC intrastate access rates are above ILEC rates, regardless of cost justification or size of CLEC service territory. The Order not only does nothing to alleviate that problem, it actually encourages all IXCs to short-pay CLECs at either the ILEC rate or at the interstate benchmark rate. Therefore, TDS Metrocom believes that, with the implementation of the Order, the FCC

Section 205 rate prescription).

[7] This figure is based on TDS Metrocom's tariffed access rate of 4.0 and assumes that 60% of access traffic is interstate in nature, which is consistent with the usage pattern of TDS

has effectively forced CLECs to reduce their intrastate access rates as well, unless they can convince a state Commission to allow separate intrastate rates.[8] This translates into reduction in access revenues of approximately 40% in 2002 and up to a 76% reduction by 2006, according to TDS Metrocom's long-range, investor-approved business plan,[9] based on the Commission's former policies.

Even more damaging is the effect that these reductions will have on operating margins which are used by investors to determine company profitability. Based on TDS Metrocom's business planning analysis, the effect of this order in 2002 will be a reduction of projected revenues of over $9 million, or nearly 7% of total revenue. Between 2002 and 2006, this translates into a reduction in operating margin of a staggering 40%. Such a reduction is of grave concern to TDS Metrocom and its investors. With TDS Metrocom's access rates being forced down to Ameritech's rates of $0.055 per minute at the end of the transition period, these impacts will not go away over time. Ultimately, it appears that the Commission is intent on eliminating these access payments altogether which will worsen any impacts. These severe and immediate cuts in revenue and profitability will significantly harm TDS Metrocom's ability to compete effectively in the telecommunications marketplace.

ii. Investment Uncertainty

Second, TDS Metrocom's ability to attract capital to enhance current offerings is now in jeopardy, and plans to expand into other small to medium-sized markets with few, if any,

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Metrocom's current customer base. *See* attached Declaration of Mark Jenn.

[8] For the reasons stated above, TDS Metrocom's analysis includes the impact of intrastate reductions mirroring the Commission's interstate benchmark decision. Metrocom will oppose state mirroring vigorously, to be sure. However, prudent management, and investor decisionmaking in response to the Order, foreclose reliance on either the interstate or the intrastate revenue flows, upon which investment and operating decisions relied under the Commission's policies and decisions before the Order's adoption.

[9] TDS Metrocom's business plan projected access rate reductions from its current level of around 4 cents per minute, down to 2 cents per minute by the year 2006.

competitive choices have been placed on hold. Although TDS Metrocom does not have to go directly to capital markets for funding, that does nothing to lessen the impact of the access charge order. TDS Metrocom's parent company, Telephone & Data Systems, when reviewing TDS Metrocom's future financial picture under the FCC's current rules, has numerous, less risky and more profitable options for the allocation of its investment capital, including fast- growing wireless and incumbent wireline subsidiaries.

Metrocom's commitments to its investors were founded on pre-Order revenue streams and the expectancy that regulatory policy makers would ensure that Metrocom would be permitted to charge cost-based access rates in the targeted markets that would allow it to recoup an appropriate portion of its costs from wholesale users. The company's entry into the CLEC business in Wisconsin, Michigan and Illinois resulted from significant business case development, including detailed market share, revenue, expense and capital expenditure evaluations. This planning and forecasting also justified substantial network build-out expenditures.

TDS Metrocom uses a comprehensive planning process which incorporates detailed financial and business analysis to support operations in existing markets as well as to justify expansion into new markets. The company develops and uses detailed 10-year forecasting models that incorporate UNE cost assumptions. As a result of the Order, TDS Metrocom's investors have ordered a comprehensive review of TDS Metrocom's business plan and projections, and will not make any decisions to invest new funds until it can be shown that those investments can generate an adequate and sustainable return over time.

In the wake of the Order, a comparison of past business cases with future projected results now shows that the company will not be able to meet projections and commitments. Based on this information, investment decisions will be made in the next few weeks and months that will have a significant impact on expansion projects already under way, as well as future projects yet to be funded. This, then, starts a vicious cycle. If additional funds are not obtained to expand into new markets, TDS Metrocom will not be able to meet its financial objectives, which will cause even more investor concern and less investment that will result in another round of missed targets and weaker investor confidence. Once investments are curtailed, particularly in the context of the current national financial crisis for the CLEC industry, the prospect of regaining investor confidence and investments is severely dimmed. Since these capital dollars are scarce resources, even if the Commission reconsiders its rules at a later date, that action will not bring back the capital dollars already diverted into other investments. Thus, the impact of the Order, whether reconsidered quickly or not, will negatively affect the expansion of competitive alternatives in small markets or for residential customers for years to come.

The probability that the uncertainty created by the Commission's failure to consider TDS Metrocom's alternative proposal will cause irreparable harm is heightened by the fact that there is no time limit for Commission review of a Petition for Reconsideration. Coupled with the current hostile environment for CLECs, a lengthy reconsideration period will cause irreparable harm to TDS Metrocom, thus warranting the requested stay.

iii. Other Forms of Significant Harm

Third, the rule's implementation will have ripple effects beyond the immediate impact of increased charges, including likely loss of skilled employees, inability to attract competent replacements and lost market share and customers, especially if Metrocom is driven to the Commission's preferred course of raising its rates. In its ruling, the Commission allowed a CLEC to recover any lost revenue from its end users through higher Subscriber Line Charges (SLC) or, presumably, higher local service rates. However, this solution is not a realistic option for TDS Metrocom or any similarly-situated competitors struggling to grow market share. Based on an aggressive projection of customer growth that is clearly in jeopardy due to recent regulatory decisions and capital market instability, TDS Metrocom would need to increase its SLC by approximately $3 per line, per month, to recover the lost revenue incurred in the first calendar year of the transition plan. As per-minute rates are reduced further, this figure would grow substantially.

Although a $3 per month rate increase does not, on its face, seem significant, when placed in the correct context, one can see how detrimental it would be. First, with ILEC SLCs capped by the FCC, any increase above the ILEC rate will place CLECs at a significant competitive disadvantage. Second, SLCs for business lines are not only capped, in some markets they are lower than residential SLCs and, in all of the states in which TDS Metrocom operates, they are going down over time. In order to continue to compete in the commercial market, CLECs will need to keep SLC increases at a minimum, if it is possible to raise those rates at all, thus placing even more pressure on residential customer rates. Additionally, residential customers are least likely to be able to bear significant price increases. Because of the large percentage of TDS Metrocom's customer base that is residential (nearly 40%), the impact of the Order is heightened.

Currently, TDS Metrocom's local service package is priced between $18-$33 per month, depending on the location of the customers and the calling features included in the package.[10] TDS Metrocom has found that it needs to generate these levels of revenue per customer, in addition to switched access revenue, in order to cover the cost of purchasing unbundled elements, deploying local facilities and servicing customer accounts. Adding to those numbers

[10] These packages include only local service and calling features such as Caller ID, Voice Mail, and Call Forwarding, to name a few. The packages do not include long distance, Internet access, DSL, or other products available from TDS Metrocom.

$5 for the residential SLC (going into effect July 1, 2001), $1 for various 911 and local right-of-way fees, and 3% for the federal excise tax (not to mention state and local taxes), current TDS Metrocom residential packages cost anywhere form $24-$40. Another $3 increase to the SLC to recover access charges places the packages at $27-$43 per month, before the customer ever makes a call. Meanwhile, the ILEC with which Metrocom competes has basic retail rates in the range of $6-$10 because of policy decisions over time that have kept retail residential rates low. Including a SLC, 911 fee and excise taxes brings the total to $12.50-$16.50. With TDS Metrocom already pricing at 2-2.5 times the ILEC's retail rates, every penny, not to mention every $3, counts. Increasing SLCs will not only hurt competition, it will effectively price many consumers out of the market and deny residential customer choice to all but those who can afford to purchase high-end telecommunications packages.

iv. Inability to Negotiate with IXCs

Finally, the harm from the access benchmarks will also be irreparable because the Commission's belief that CLECs like Metrocom, that compete in markets which are less dense and therefore more costly to serve, can negotiate higher rates with IXCs is simply wrong. Even if IXCs were willing to negotiate, which would be against their interests, setting rates outside the tariff process imposes burdens and transaction costs on CLECs. IXCs have little, if any, incentive to negotiate access charge rates with TDS Metrocom. Metrocom is being forced to file below-cost tariffs, and the Commission has made no provision for later reimbursement by retroactive relief in the event reconsideration results in permitting Metrocom to tariff cost-based rates.

C. No Other Interested Parties Will Be Substantially Harmed if the Commission Issues a Stay in this Instance

With respect to the third portion of the test, TDS Metrocom submits that no other interested parties will be substantially harmed if the Commission grants a stay. Metrocom's portion of the IXC's annual access charge payments to CLECs are insignificant. According to the FCC's Statistics of Communications Carriers, for the year ended 1999, Network Access Service revenue for all reporting LECs was nearly $28 billion.[11] As stated above, TDS Metrocom projects a reduction in revenue of approximately $9 million in the first calendar year of the Order. This equates to approximately 0.00032% of the total access revenue market reported in 1999; it stands to reason that the percentage in relation to today's market would likely be even smaller. Thus, it is clear that the relative impact of the Order on any single IXC or the entire access market pales in comparison to the significance of the impact of the Order on TDS Metrocom. Even if the Commission stayed the order pending reconsideration for all carriers serving lower-tier markets, although there are likely to be few CLECs that do not target the largest urban core markets, the impact on the IXCs would be extremely small. Thus, continuing Metrocom's current cost- and market-based access charges while the Commission considers, for the first time, Metrocom's alternative proposal would represent a negligible additional level of payments for IXCs. Furthermore, continuing Metrocom's current access charges would not result in additional long distance charges for long distance consumers, given that no IXC has reduced its rates to pass through savings generated as a result of the Order. In fact, at least one large IXC has recently proposed increasing its basic long distance rates even though it will incur reduced costs from this Order.

As noted, Metrocom's rates were properly based on costs and market rates of similarly situated (i.e., independent) ILECs, not the far higher rates the Order discusses, and which seem to underlie the Commission's presumption that all but the most rural CLECs' rates were excessive. Nor is there is a scintilla of evidence that Metrocom has in any way abused the tariff

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[11] Industry Analysis Division, Federal Communications Commission, 1999 Statistics of Communications Common Carriers at 130 (Table 2.13) (2000).

process. Indeed, it is the CLECs, and not the IXCs, that are experiencing substantial financial hardships.

Moreover, even if the Commission ultimately denies the Metrocom Petition for Reconsideration (and prevails in any judicial review if a stay is granted), interexchange carriers will not be harmed because the Commission can enter an accounting order to provide for any necessary reimbursements to true-up interexchange carrier access charges to the levels prescribed in the Order. Because the TDS Metrocom charges comprise a minuscule percentage of access charges, no IXC will be significantly affected by maintaining the status quo until the Commission acts on the Reconsideration Petition.

D. The Issuance of a Stay Is in the Public Interest

The final prong of the test requires the Commission to assess whether the issuance of a stay would serve the public interest. The Commission has previously determined that it is in the public interest to grant a stay where a CLEC would be hindered from developing and offering its competitive local exchange services. *Hyperion Communications Long Haul, L.P.*, Order, DA 00-787, 15 FCC Rcd. 10,202, paras. 6-7 (rel. Apr. 11, 2000). Similar to Hyperion, TDS Metrocom will be hindered from developing and offering its CLEC services to residential customers and new small and medium-sized markets if the Commission does not issue a stay. Accordingly, the public interest will be served by the issuance of a stay.

Moreover, the one-size-fits-all access charge regime adopted by the Commission, without reviewing TDS Metrocom's more sensible and less harmful alternative, rests on the expectation that TDS Metrocom will pass these costs along to its largely residential customers and small business customers, which will also disserve the public interest. The upshot of the Order will be to reduce competitive alternatives and deny competitive choice to individuals who cannot afford high-end telecommunications packages.

III. Conclusion

Because the Commission failed to consider the significant and important alternative plan proposed by TDS Metrocom, and has effectively prescribed below-cost rates for Metrocom, the Commission is under a procedural and statutory mandate to reconsider the Metrocom plan, as requested in Metrocom's Petition for Reconsideration. In the meantime, the Commission should issue a stay to maintain the status quo prior to the Order at least until such time as the Commission has completed its review of the alternative plan.

Respectfully submitted,

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By: Margot Smiley Humphrey

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June 28, 2001

WAS1 #988588 v3

DECLARATION OF MARK JENN

I, Mark Jenn, am the Manager – Federal Affairs of TDS Metrocom, Inc. (TDS Metrocom), the Petitioner in this proceeding. My responsibilities include monitoring federal regulatory activity for TDS Metrocom, analyzing and assessing the impact on TDS Metrocom of changes in federal rules, and advising TDS Metrocom's leadership team on how federal policy changes could affect the company's ability to meet its financial objectives.

As an employee at TDS Metrocom, I have knowledge of the services currently provided by TDS Metrocom, as well as its plans for expansion. I also have knowledge of TDS Metrocom's financial information, including its past and planned investment and its actual and projected revenues.

I have reviewed and am familiar with the facts set forth in TDS Metrocom's Petition for Stay (Petition). Section II of the Petition contains financial impact information and projections prepared by me or under my supervision, under the assumptions identified in the Petition.

I declare, under penalty of perjury, that the statements in this Declaration and the Petition are true to the best of my knowledge.

Executed on June 28, 2001 by

Mark Jenn

<u>CERTIFICATE OF SERVICE</u>

I, Naja Gamble-Wheeler, of Holland & Knight LLP, 2099 Pennsylvania Ave., NW, Suite 100, Washington, DC 20006, do hereby certify that a copy of the foregoing Petition for Stay of TDS Metrocom, Inc. was served on this 28th day of June, 2001, via hand delivery or by first class mail, to the following parties:

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Naja Gamble-Wheeler

TDS METROCOM, INC.
PETITION FOR STAY

EXHIBIT 1

Federal Communications Commission

The FCC Acknowledges Receipt of Comments From ...
TDS Metrocom, Inc.
...and Thank You for Your Comments

Your Confirmation Number is: '2001126077453 '	1
Date Received:	Jan 26 2001
Docket:	97-146
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